Suria Labs Development Sdn Bhd v Bai Yang Infrastructure Group Ltd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-126–03 OF 2023
ONG CHEE KWAN J
16 APRIL 2025

Contract Law — Service agreement — Enforceability of contract and evidential burden — Plaintiff provided software development services for e-gaming website — Defendant claimed software was defective and agreement was illegal — Whether defendant provided evidence to rebut plaintiff's claims — Whether service agreement illegal against public policy

By a service agreement ('service agreement') entered into between the plaintiff and defendant, the plaintiff agreed to render services to the defendant particularly to provide software development services ('the services') for the development of an e-gaming website known as 'BitCarra'. The plaintiff was engaged to carry out services to create a prototype of a gaming website as required by the Curacao authorities in order for the defendant to obtain e-gaming licence in Curacao. Throughout the tenure of the service agreement, the number of developers provided to the defendant were in accordance with the needs, requirements and/or request of the defendant. The plaintiff then issued invoices for all services rendered. The defendant had paid a sum of USD361,700. However, a sum of USD248,000 had remained outstanding and payable. The plaintiff issued a notice to the defendant requiring the defendant to pay the outstanding sum failing which all works in relation to the services under the service agreement would be suspended. However, the defendant failed to pay the outstanding sums. Consequently, the plaintiff suspended all further works in relation to the services with immediate effect and claimed the balance of USD248,000 against the defendant. In his defence, the defendant pleaded that: (a) the period of the service agreement was from 14 April 2021 to 13 October 2021 and BitCarra was not completed by 31 October 2021; (b) the defendant denied that the service agreement had been extended until 21 August 2022; (c) the plaintiff knew that BitCarra promoted by the plaintiff was intended to be used as an online casino and was illegal as against public policy; (d) the plaintiff was unable to complete the e-gaming website application as promised. As such, the launching of the e-gaming website application had to be postponed and had caused detriment and unforeseeable loss to the defendant; and (e) the e-gaming website application had failed to function during its test run period, and because the e-gaming application failed to function properly, it was discontinued in March 2022.

Held:

(1) DW1 had no personal knowledge regarding instructions given to the plaintiff, issues faced during the development as well as bugs and fixes relating to the BitCarra software. The defendant was unable to rebut the testimony of PW1 who was the previous Chief Executive Officer and director of the plaintiff that the service agreement which was initially intended to run until 13 October 2021 was subsequently varied on several occasions at the behest of the defendant to continue up until 31 August 2022. The plaintiff had led evidence to show that the BitCarra prototype was in fact completed and was successfully launched on or around 31 August 2021 and/or 1 September 2021, which was within the initial period stipulated in the service agreement. The defendant's claim that the plaintiff had disabled the BitCarra software and that the defendant could no longer operate the same was also not supported by the evidence. As such, the defendant's claims that was a total failure of consideration by reason that the plaintiff had failed to complete the e-gaming website and/or that the e-gaming website had failed to function properly and/or that the e-gaming website application software provided by the plaintiff was incomplete, inefficient, inappropriate and inconsistent with that agreed between the plaintiff and the defendant and could not function properly because the application was full of bugs were not established at all. The defendant could not raise any evidence to discharge its evidential burden after the plaintiff had testified that the plaintiff had performed its obligations to the defendant under the service agreement. The defendant's testimony through DW1 that there were bugs in the BitCarra software by referring to various conversations between the parties was insufficient to discharge the evidential burden that the plaintiff had fulfilled its obligation to develop a prototype which would enable the defendant to obtain an e-gaming licence for the operation of a gaming website from the Curacao authorities. As regards the defendant's contention that the plaintiff had failed to deliver an online gaming platform that was able to operate multiple cryptocurrencies for payment purposes, the defendant had not shown any agreement that the plaintiff was obliged to develop such a platform for the defendant and even then, that there was a contractual dateline for delivering such a platform. Therefore, the plaintiff had successfully discharged its legal burden on the balance of probabilities that the defendant was indeed liable to pay the plaintiff the outstanding sum of USD248,000 (see paras 16, 18, 22, 28, 33–35, 37 & 41).

(2) There was no merit in the contention that the service agreement ought not to be enforceable by reason of the same being illegal on the ground that the agreement was either immoral or opposed to public policy in Malaysia. The service agreement was entered into because the defendant had wanted the plaintiff to provide manpower and/or developers in order

for the defendant to develop a prototype of a gaming website which would enable the defendant to obtain an e-gaming licence from the Curacao authorities. Nowhere in the service agreement did it state that the website was for gambling or an online casino gaming platform that would be operated from Malaysia (see paras 46–47).

[Bahasa Malaysia summary

Berdasarkan satu perjanjian perkhidmatan ('perjanjian perkhidmatan') yang dimeterai antara plaintif dan defendan, plaintif bersetuju untuk memberikan perkhidmatan kepada defendan khususnya untuk menyediakan perkhidmatan pembinaan perisian ('perkhidmatan') bagi pembinaan laman web e-permainan yang dikenali sebagai 'BitCarra'. Plaintif telah ditugaskan untuk menjalankan perkhidmatan bagi mewujudkan prototaip laman web permainan seperti yang dikehendaki oleh pihak berkuasa Curacao untuk defendan mendapatkan lesen e-permainan di Curacao. Sepanjang tempoh perjanjian perkhidmatan, bilangan pembina yang disediakan kepada defendan adalah selaras dengan keperluan, kehendak dan/atau permintaan defendan. Plaintif kemudiannya mengeluarkan invois untuk semua perkhidmatan yang diberikan. Defendan telah membayar sejumlah USD361,700. Walau bagaimanapun, sejumlah USD248,000 masih belum dijelaskan dan perlu dibayar. Plaintif mengeluarkan notis kepada defendan yang memerlukan defendan membayar jumlah yang belum dijelaskan, yang mana jika gagal berbuat demikian, semua kerja berkaitan perkhidmatan di bawah perjanjian perkhidmatan akan digantung. Walau bagaimanapun, defendan gagal membayar jumlah yang belum dijelaskan. Akibatnya, plaintif menggantung semua kerja selanjutnya berkaitan perkhidmatan tersebut serta-merta dan menuntut baki USD248,000 terhadap defendan. Dalam pembelaannya, defendan memplid bahawa: (a) tempoh perjanjian perkhidmatan adalah dari 14 April 2021 hingga 13 Oktober 2021 dan BitCarra tidak disiapkan pada 31 Oktober 2021; (b) defendan menafikan bahawa perjanjian perkhidmatan telah dilanjutkan sehingga 21 Ogos 2022; (c) plaintif tahu bahawa BitCarra yang dipromosikan oleh plaintif bertujuan untuk digunakan sebagai kasino dalam talian dan adalah menyalahi undang-undang bertentangan dengan dasar awam; (d) plaintif tidak dapat menyiapkan aplikasi laman web e-permainan seperti yang dijanjikan. Oleh itu, pelancaran aplikasi laman web e-permainan terpaksa ditangguhkan dan telah menyebabkan kerugian dan kehilangan yang tidak dijangka kepada defendan; dan (e) aplikasi laman web e-permainan telah gagal berfungsi semasa tempoh percubaan, dan kerana aplikasi e-permainan itu gagal berfungsi dengan betul, ia telah dihentikan pada Mac 2022.

Diputuskan:

(1) DW1 tidak mempunyai pengetahuan peribadi mengenai arahan yang diberikan kepada plaintif, isu-isu yang dihadapi semasa pembinaan serta pepijat dan pembetulan berkaitan perisian BitCarra. Defendan tidak

dapat menyangkal keterangan PW1 yang merupakan Ketua Pegawai Eksekutif dan pengarah plaintif sebelum ini bahawa perjanjian perkhidmatan yang pada asalnya bertujuan untuk berkuat kuasa sehingga 13 Oktober 2021 kemudiannya dipinda beberapa kali atas permintaan defendan untuk terus berkuat kuasa sehingga 31 Ogos 2022. Plaintif telah mengemukakan keterangan untuk menunjukkan bahawa prototaip BitCarra sebenarnya telah disiapkan dan berjaya dilancarkan pada atau sekitar 31 Ogos 2021 dan/atau 1 September 2021, iaitu dalam tempoh awal yang ditetapkan dalam perjanjian perkhidmatan. Dakwaan defendan bahawa plaintif telah melumpuhkan perisian BitCarra dan defendan tidak lagi dapat mengendalikannya juga tidak disokong oleh keterangan. Oleh itu, dakwaan defendan bahawa terdapat kegagalan pertimbangan sepenuhnya kerana plaintif gagal menyiapkan laman web e-permainan dan/atau laman web e-permainan gagal berfungsi dengan betul dan/atau perisian aplikasi laman web e-permainan yang disediakan oleh plaintif tidak lengkap, tidak cekap, tidak sesuai dan tidak selaras dengan apa yang dipersetujui antara plaintif dan defendan serta tidak dapat berfungsi dengan betul kerana aplikasi itu penuh dengan pepijat tidak dapat dibuktikan sama sekali. Defendan tidak dapat mengemukakan sebarang keterangan untuk melepaskan beban pembuktiannya selepas plaintif memberi keterangan bahawa plaintif telah melaksanakan kewajipannya kepada defendan di bawah perjanjian perkhidmatan. Keterangan defendan melalui DW1 bahawa terdapat pepijat dalam perisian BitCarra dengan merujuk kepada pelbagai perbualan antara pihak-pihak adalah tidak mencukupi untuk melepaskan beban pembuktian bahawa plaintif telah memenuhi kewajipannya untuk membina prototaip yang akan membolehkan defendan memperoleh lesen e-permainan untuk pengendalian laman web permainan dari pihak berkuasa Curacao. Berhubung dengan dakwaan defendan bahawa plaintif gagal menyerahkan platform permainan dalam talian yang dapat mengendalikan pelbagai mata wang kripto untuk tujuan pembayaran, defendan tidak menunjukkan sebarang perjanjian bahawa plaintif berkewajipan untuk membangunkan platform sedemikian untuk defendan dan walaupun begitu, bahawa terdapat tarikh akhir kontrak untuk menyerahkan platform sedemikian. Oleh itu, plaintif telah berjaya melepaskan beban undang-undangnya atas imbangan kebarangkalian bahawa defendan sememangnya bertanggungjawab untuk membayar kepada plaintif jumlah yang belum dijelaskan sebanyak USD248,000 (lihat perenggan 16, 18, 22, 28, 33–35, 37 & 41).

(2) Tiada merit dalam dakwaan bahawa perjanjian perkhidmatan tidak seharusnya boleh dikuatkuasakan oleh sebab ia menyalahi undang-undang atas alasan bahawa perjanjian itu tidak bermoral atau bertentangan dengan dasar awam di Malaysia. Perjanjian perkhidmatan

telah dimeterai kerana defendan ingin plaintif menyediakan tenaga kerja dan/atau pembina untuk defendan membina prototaip laman web permainan yang akan membolehkan defendan memperoleh lesen e-permainan daripada pihak berkuasa Curacao. Tiada di mana-mana dalam perjanjian perkhidmatan menyatakan bahawa laman web itu adalah untuk perjudian atau platform permainan kasino dalam talian yang akan dikendalikan dari Malaysia (lihat perenggan 46–47).]

Legislation referred to

Contracts Act 1950 s 24

Norliza bt Rasool Khan (with Frankie Tan Kah Hian) (Liza Khan Chambers) for the plaintiff.
Ung Chirt Kye (with Yong Li Tzer) (Phee, Chen & Ung) for the defendant.

Ong Chee Kwan J:

INTRODUCTION

[1] The plaintiff in this case claimed a sum of USD248,000 being the balance outstanding sums due under an agreement where the plaintiff was to provide software developers to the defendant to create a prototype gaming website which would enable the defendant to obtain an e-gaming license from the Curacao Authorities.

[2] The defendant raised various issues relating to the quality of the services rendered by the plaintiff, contending that there were bugs in the software and that the website could not be operated because the plaintiff had shut down the same. Unfortunately, the defendant's only witness had no personal knowledge of the events that had occurred in the development of the software and was not privy to the communication between the defendant and the plaintiff at the material times. As a result, the defendant was not able to rebut many of the assertions made by the witnesses who had testified on behalf of the plaintiff at the trial.

[3] The outcome of the trial in this case demonstrates the failure by the defendant to appreciate the crucial role of evidential burden in a civil trial which can shift once a party has produced sufficient evidence, be it by oral testimony or through documentary evidence on a specific issue. A witness without any personal knowledge of the issues would not be in a position to contradict or undermine the evidence presented which means that at the end of the trial, evidence remaining unrebutted will be sufficient to discharge the legal burden needed to meet the cause of action.

A BACKGROUND FACTS

[4] At all material times, the plaintiff was a reputable and leading web and mobile application developer with clients worldwide including in Malaysia, Denmark, Australia, Singapore and the United States of America as can be seen from the plaintiff's company website at www.surialabs.com and was in the business of software development and IT services.

[5] By a service agreement dated 13 April 2021 ('service agreement') entered into between the plaintiff and defendant, the plaintiff agreed to render services to the defendant particularly to provide software development services ('the services') for the development of an e-gaming website known as 'BitCarra'.

[6] The preamble of the service agreement expressly stated that the plaintiff was engaged to carry out services to create a prototype of a gaming website as required by the Curacao Authorities in order for the defendant to obtain e-gaming licence in particular, in Curacao.

[7] The salient terms of the service agreement were as follows:

Clause	Description
1.1(a)	In consideration of the Fees (set out at Clause 4 hereinbelow), Suria Labs shall provide the Client with the following services:
	Software development with features as requested by the Client from time to time during the term of this Agreement in sprints ('Sprint') as described in the Statement of Work ('the Statement') attached hereto as Annexure A and incorporated herein by reference as though fully set forth ('the Development Phase');
	(e) Upon the conclusion of the Development Phase, The Client may be desirous of entering into a time bound period for maintenance. Suria Labs shall then provide error correction, bug fixes, support, upgrades, maintenance, enhancements and all related services as set out in Annexure B to this Agreement (the 'Maintenance and Enhancement Phase'). (collectively referred to as the 'Services')
2.1	Suria Labs will make available 4 developers during the Development Phase as required to complete the initial scope within 26 weeks. Suria Labs reserves the right to reassign developers to other projects if there are delays caused by 3rd parties or other issues not under the control of Suria Labs.

2.2 Upon the completion of the Development Phase, for the duration of the Maintenance and Enhancement Phase, Suria Labs will make available developer resource(s) should the client be desirous of entering into a retainer agreement. Otherwise, resources will be available on an hourly basis for a pre-selected number of hours per month.

2.3 The assigned developers will handle, amongst others, the following:

(a) Feature development;

(b) Writing of unit and acceptance tests;

(c) Maintenance and bug fixing; and

(d) Scaling and other deployment concerns.

2.5 Suria Labs will provide a Project Manager to manage the development processes and to facilitate communication between the Client and Suria Labs' development team.

2.6 The Project Manager will organize:

Sprint meetings; and

Maintain and update Trello and/or any other project management system deployed by Suria Labs.

3.1 This Agreement shall be effective from 14th April 2021 ('Commencement Date') and shall continue until the expiry of the term on 13th October 2021 ('End Date') as necessary to complete the Services, unless terminated earlier in accordance with this Agreement; or extended by mutual consent.

4.1 Suria Labs shall be paid a weekly fee at a rate of USD1,600.00 per developer.

4.2 One (1) designer will be assigned part-time or as required during both the Development and Maintenance phase. Design hours will be billed on an hourly basis at USD50.00 per hour and will be reflected in the following month's invoice.

4.3 Suria Labs shall issue an invoice on the kick-off date and subsequently on the 1st of each month. The Client shall make payment of each invoice within 15 days of the issuance date.

4.4 The invoices may be issued by email and are deemed received upon sending of the email by Suria Labs.

7.3 At no material time does Suria Labs warrant that the Software will be free form defects and errors.

7.4 The Client represent warrants and agrees that its responsibilities with respect to the development are as follows:

7.4.1 It shall not operate the gaming website in any jurisdiction where such may be illegal and without a valid licence including in Malaysia, Hongkong and Curacao;

7.4.2 It shall obtain the requisite and valid licence from each jurisdiction the website is to be operated prior to operation of the gaming website;

7.4.3 It shall notify Suria Labs immediately upon discovery of any potential breach or illegality in relation to the operation of the gaming website.

7.4.1 The Client shall pay the monthly fees in accordance with Clause 4 herein.

7.4.2 The Client shall provide all assistance and cooperation to Suria Labs in order to complete the development of the Software in a timely and efficient manner; and

7.4.3 The Client shall provide all relevant information and documents necessary and practicable to Suria Labs to enable Suria Labs to carry out the works.

[8] The service agreement was an agile retainer agreement based on time and material whereupon the services were rendered for as long as required by the defendant. The service agreement continued at the behest of the defendant. In this regard, the plaintiff contended that the service agreement was extended until 31 August 2022.

[9] Throughout the tenure of the service agreement, the number of developers provided to the defendant were in accordance with the needs, requirements and or request of the defendant.

[10] In accordance with cl 4 of the service agreement, the plaintiff issued the following invoices for all services rendered:

Invoice No	Date	Amount (USD)
1249	14 April 2021	14,500
1254	30 April 2021	25,600
1264	31 May 2021	33,600
1273	6 July 2021	54,400
1280	2 August 2021	51,200
1289	31 August 2021	51,200
1296	1 October 2021	51,200
1304	2 November 2021	44,800
1306 (credit note)	4 November 2021	-9,600
1311	2 December 2021	44,800
1320	*5 January 2022*	*44,800*
1327	*4 February 2022*	*44,800*
1334	*1 March 2022*	*44,800*
1341	*29 April 2022*	*44,800*

Invoice No	Date	Amount (USD)
1347	*4 May 2022*	*30,400*
1354	*1 June 2022*	*19,200*
1362	*9 July 2022*	*19,200*
	TOTAL	609,700

[11] The defendant had paid a sum of USD361,700. However, a sum of USD248,000 had remained outstanding and payable comprising the amounts for the invoices issued between 4 February 2022 to 9 July 2022 (in italics above).

[12] On 29 July 2022, the plaintiff issued a notice to the defendant via the slack application requiring the defendant to pay the outstanding sum failing which all works in relation to the services under the service agreement would be suspended. However, the defendant failed to pay the outstanding sums. Consequently, the plaintiff suspended all further works in relation to the services with immediate effect.

[13] By a letter dated 12 December 2022 from the defendant's solicitors to the plaintiff's solicitors ('the defendant's reply'), the defendant replied stating, inter alia:

(a) that the service agreement was void ab initio on the ground that it was tainted with illegality;

(b) the defendant did not owe the outstanding sum;

(c) the plaintiff had grossly overcharged the defendant; and

(d) the defendant's complaints that the gaming website was not operating were left unaddressed.

[14] In the amended defence, the defendant pleaded as follows:

(a) pursuant to cl 3.1 of the service agreement, the period of the service agreement was from 14 April 2021 to 13 October 2021 and BitCarra was not completed by 31 October 2021;

(b) the defendant denied that the service agreement had been extended until 21 August 2022 and if there was an extension, the said extension of time was agreed upon due to economic duress and was not voluntary. The defendant insisted that the time period for the plaintiff to carry out its responsibilities to develop and provide an e-gaming website application known as BitCarra as stated was from 14 April 2021 to 13 October 2021;

(c) the plaintiff knew that BitCarra promoted by the plaintiff was intended to be used as an online casino with blackjack, roulette, baccarat and so on

A and was illegal as against public policy;

(d) as the time approached for the e-gaming website application to be completed, it became clear and obvious that the plaintiff was unable to complete the e-gaming website application as promised. As such, the launching of the e-gaming website application had to be postponed to a later time. This had caused detriment and unforeseeable loss to the defendant; and

(e) the said e-gaming website application had failed to function during its test run period, and because the e-gaming application failed to function properly, it was discontinued in March 2022. Due to the above problems, the defendant had to find a new application developer to fix the defects of the plaintiff's work and BitCarra could only be used and reopened in September 2022.

THE COURT'S CONSIDERATIONS

[15] The defendant's main contention was that the plaintiff was not entitled to claim the sum of USD248,000 for the following reasons:

(a) the plaintiff had failed to deliver the BitCarra software in accordance with the terms stipulated in the service agreement;

(b) the BitCarra Software developed by the plaintiff was full of bugs;

(c) the BitCarra Software was incomplete and inoperative;

(d) the services provided by the plaintiff were not professional, efficient, or workmanlike and were inconsistent with the standards of the software industry as provided in cl 7.2 of the service agreement; and

(e) the sum claim was unreasonable and there was a total failure of consideration.

[16] At the trial, the defendant had only one witness. Mr Andy Tam Yuk Ming ('DW1') who claimed to be the director of the defendant who was overseeing the BitCarra software development. However, at the trial, DW1 readily admitted that he had no personal knowledge of the facts relating to the development of the BitCarra software at all. During cross-examination, DW1 testified that he was not a party to any meetings, all emails and the slack communications and or any of the communication in this matter between the plaintiff and the defendant's representatives. As such, he had no personal knowledge regarding instructions given to the plaintiff, issues faced during the development as well as bugs and fixes relating to the BitCarra software.

[17] DW1's complete lack of any personal knowledge of the BitCarra software development was amply demonstrated in his answers to the questions

asked of him during cross-examination, the relevant portions of which are set out below:

NORLIZA: Can we just look at same bundle B1? There are emails, I'll just take them all together. We start page 156 up to 171. These are all emails. Can he just confirm that he's not copied, he is not a party to these emails? He's not copied in these emails. He's not a party?

DW1: I did not receive; I also did not send out this document.

NORLIZA: He didn't receive them, ya okay. So my next question is, can he confirm that he doesn't know anything about the discussion in these emails?

DW1: I don't know.

NORLIZA: There were also various meetings. Actually, there were lots of meetings throughout this whole project. My question is, can you confirm that he did not attend any of these meetings?

DW1: I did not attend.

NORLIZA: So, my next question is, he has no personal knowledge about anything that happened in any meetings or any emails pertaining to this project? No personal knowledge?

DW1: Agree.

NORLIZA: Now, can we look at his question and answer 5? I'm going cross-refer to C1. In bundle C1, there are statements of work, pages 1 to 3. My question is, have you seen them before this suit?

DW1: I think my memory does not exist, because I don't understand this.

NORLIZA: So, he cannot confirm whether he has seen them? Can he confirm that he has not seen them?

DW1: I am not sure whether I have read his document or not. Because I don't understand the contents.

NORLIZA: I'm going put to him that all these statements of works were sent to Joel Lim?

DW1: I didn't recall in this work, how many ... I have no idea.

NORLIZA: So, he can also confirm that he doesn't know about the change in the number of developers. Throughout the project, there was change in number of developers provided. Can he confirm that he doesn't know the changes? We initially supplied four developers, then became five, went up to seven, become three. Just to confirm that he doesn't know the changes in the number of developers throughout the project?

DW1: I don't know.

NORLIZA: Thank you. Can we go to his question and answer 6. Can he confirm that he did not attend the kick-off meeting for this project, which was on 22nd April 2021? He didn't attend the kick-off meeting. My question now is, there was a

kick-off meeting on 22nd April 2021. Can he confirm he did not attend?

DW1: I agree I did not attend.

NORLIZA: So, can he also confirm ... Sorry, we refer to Bundle B4, pages 200 to 231. These are transcripts of meetings, various meetings. Can he confirm that he never attended any?

DW1: Yes, I did not attend.

NORLIZA: So, he has no personal knowledge about any of these meetings?

DW1: I don't know, yes.

NORLIZA: Can we look at Bundle B2 at pages 7 to 253? Bundle B2. Page 7 to 263, sorry. This is called Slack, S-L-A-C-K, Slack communication. Can you confirm that he was not in any of these Slack communications?

DW1: Agree.

NORLIZA: I'm going to refer to his witness statement where he talks about ... everywhere where he talks about bugs, which would be question and answer 8, 11, 14, and 15. My question is, can he confirm he has no personal knowledge about how these developments, about these bugs that he talked about? No personal knowledge, the bugs.

DW1: Agree.

NORLIZA: Question and answer 13. Can he confirm that there's no written complaints made to the Plaintiff about their services?

DW1: I don't know.

NORLIZA: Question and answer 14. I'm just going to put to him that no full testing was done on the prototype to be able to launch to the public? To be ready for public? Or he's not aware? He's not aware? Is he aware?

YA: No, no, let him answer first.

NORLIZA: Okay.

DW1: I don't know about this.

NORLIZA: Now, question and answer 16 and 17, about the BitCarra being taken offline. And also this morning he said the Plaintiff stopped. This morning he said BitCarra was locked by the Plaintiff. My question is, can he confirm he also has no personal knowledge about this? About the lock and why it's taken down.

DW1: I agree, I don't have personal knowledge.

NORLIZA: Is he aware that the code for BitCarra was given to the defendant?

DW1: I not aware.

NORLIZA: I'm going to put him that the code is with the defendant and the defendant can reinstate BitCarra at any time? The code is with the defendant, so the defendant can reinstate BitCarra at any time?

DW1: I don't know about how the situation was. Because our company staff already left the company.

NORLIZA: I'm going to put to him that the code was given to the defendant? I put to him, so he can agree, disagree or he is not aware?

DW1: I don't know.

NORLIZA: And can you confirm that this was using the changed prototype? This was using the revised prototype. Does he know or not?

DW1: I did not involve with the management. I don't know.

[18] By reason of the aforesaid, the defendant was unable at the trial to rebut the testimony of Mr Bjarte Olsen ('PW1') who was the previous Chief Executive Officer and director of the plaintiff that the service agreement which was initially intended to run until 13 October 2021 as stipulated in cl 3.1 therein was subsequently varied on several occasions at the behest of the defendant to continue up until 31 August 2022 ('the extended period'). This extended period was supported by the statement of work dated 22 April 2022 with the agreed additional developers based on the weekly rate per developer of USD1,600.

[19] PW1 also referred to various email trails between the plaintiff and the defendant wherein the plaintiff had provided developers to the defendant at the rate of USD1,600 per week for the following periods:

(a) four developers from 13 April 2021 to 23 May 2021;

(b) five developers from 24 May 2021 to 13 June 2021;

(c) six developers from 14 June 2021 to 30 June 2021;

(d) seven developers from 7 July 2021 to 6 May 2022; and

(e) three developers from 7 May 2022 to 31 August 2022.

[20] PW1 further testified that more developers were requested by the defendant, through one Joel Lim due to the various changes to the initial scope of services to be rendered through the period of the service agreement, including the expansion and revision of the prototype to add more features such as affiliate gaming and campaigns. This was possible as the service agreement was an agile agreement.

[21] By an agile agreement, PW1 explained that the agreement was based on time and material whereby the services were rendered as long as required by the defendant. In this regard, whilst the preamble of the service agreement had stated that the plaintiff was engaged to carry out services to create a prototype of a gaming website as required by the Curacao Authorities in order for the

defendant to obtained an e-gaming license for the operation of a gaming website in Curacao, PW1 testified that the defendant as the product owner had decided to include additional features which had required the plaintiff to supply the manpower developers who would develop the BitCarra software based on instructions by the defendant. PW1 also provided details of the changes and or additions to the BitCarra software in his answers to Q/A 44 of his witness statement marked as 'WS PW1'.

[22] Significantly, the plaintiff had led evidence to show that the BitCarra prototype was in fact completed and was successfully launched on or around 31 August 2021 and or 1 September 2021, which was within the initial period stipulated in the service agreement. In this regard, the plaintiff had referred to:

(a) the defendant's official Facebook post and medium.com post where the defendant had advertised its soft launch of the BitCarra website;

(b) PW1, PW2 and PW3 also testified to the defendant's various social media posts showing that BitCarra was launched sometime on 31 August 2021 and or early September 2021; and

(c) PW1, PW2 and PW3 also testified that notwithstanding that BitCarra was up and running in August/September 2021, the service agreement was extended at the request of the defendant so that new features could be added. They also testified that all outstanding bugs had been attended to:

> CK UNG: If six months is sufficient to complete the project, why there is a necessity to extend it further and further, for more than a year?
>
> PW1: Because they kept adding new features to the project. The first version was launched, the end of the initial service agreement ended.
>
> CK UNG: So, you are saying that the website is ready for operation by July of 2022?
>
> PW2: By that time, we had completed outstanding bugs and ... yes, in my opinion.

[23] In fact, PW2 had testified that because the defendant was eager to launch the BitCarra site as quickly as possible, there was insufficient testing made to the Bitcarra software to uncover all its bugs:

> NORLIZA: So, can you elaborate why you do not agree that the original six months was not sufficient?
>
> PW2: So, as I explained earlier when you asked me about the proper development process, we usually do a software development phase where the program is developed. And then there should be a testing phase where any changes are discovered, any bugs are uncovered, and any change is made. And then the test is repeated until everything works out as it should. And I believe in this case, the

> Defendant was eager to launch as quickly as possible. So, after the six months, they were eager to just launch directly without a proper testing phase first. So, their quality assurance was definitely missing, I would say.

[24] PW1, PW2 and PW3 testified that bugs are an invariable part of software development and PW2 explained that in this case, the defendant had refused to do adequate testing. In any case, PW1, PW2 and PW3 led evidence that all the bugs raised as at the point the service agreement was terminated had been addressed and resolved. The defendant led no evidence to rebut their testimonies.

[25] Further, based on the meeting transcript dated 23 February 2022, what was disclosed therefrom was that the delays of the licensing of the defendant's website by the Curacao Authority was due to issues between the defendant and a third party known as Softswiss. In the meeting transcript dated 24 March 2022, Joel Lim had also informed the plaintiff's developers that if there were any delays in the licensing process, all the campaign system features would also be delayed.

[26] PW1, PW2 and PW3 also led evidence that during the meeting on 4 April 2022, Joel Lim had told the plaintiff's developers to leave production as it was for another two to three weeks for the licensing process whereby there were no further issues apart from minor tweaks and changes requested by one Naomi. The evidence of PW1, PW2 and PW3 were unrebutted.

[27] Indeed, based on the documents in the bundles of documents, the defendants had consistently paid all the invoices raised by the plaintiff without any complaints whatsoever that the BitCarra software was incomplete and or not operational and or not in accordance with the defendant's request. On the contrary, when the defendant could not pay the plaintiff the invoices claimed in this action, the defendant had made repeated promises to pay without any hints that the BitCarra software was defective in any way and or that the plaintiff's services were not up to mark. The defendant had kept saying that it needed time to pay.

[28] Further, the defendant's claim that the plaintiff had disabled the BitCarra software and that the defendant could no longer operate the same was also not supported by the evidence. In this regard, PW3 testified that the discontinuance of the prototype during March 2022 was in fact at the express request of the defendant as evidenced by the transcript of the meeting on 28 March 2022 where Joel Lim mentioned that the game lobby was sent to Softswiss for acceptance test and thereafter reviewed by the Curacao Gaming Authority. Joel Lim had specifically mentioned that the defendant would be shutting down their current production of the game and instructed the

plaintiff to eliminate and hide everything, including the affiliate system, existing Crash and Duo Crash games and The Wheel of Fortune as part of the deployment to production for the licensing process as well as to close all deposits and enable withdrawals as no real cryptocurrencies could be deposited on the platform during this period.

[29] Significantly, PW3 testified that the defendant had been given access to the codes to enable the features that the defendant had instructed the plaintiff to disable which meant that the defendant could operate the software, if it wanted to. This was not challenged at all.

[30] As alluded to above, the defendant did not call any one who had personal knowledge of the BitCarra software development project undertaken by the defendant with the plaintiff to rebut the testimonies of PW1, PW2 and PW3. In fact, during the trial, DW1 admitted that Joel Lim was the representative of the defendant who had given all the instructions in relation to the development of BitCarra to the plaintiff. Joel Lim was listed as a witness for the defendant and a subpoena was issued for his attendance (see: encl 58). However, the subpoena was not served on Joel Lim. No reason was proffered.

[31] In fact, quite apart from Joel Lim, one Henry Tam who was a key-player in this matter and the son of DW1 who was present in court at the trial and sat through the trial was also not called to testify.

[32] DW1 did not have any personal knowledge of the matters to rebut the testimonies of the plaintiff's witnesses. Neither did the defendant procure any expert witness or someone with technical knowledge to testify to support their assertion that BitCarra was defective or unfinished or unfit for its purpose. Neither did the defendant procure anyone to testify that the BitCarra website could only be made operational in September 2022 after the purported defects to the same were purportedly rectified by another developer.

[33] As such, the defendant's claims that was a total failure of consideration by reason that the plaintiff had failed to complete the e-gambling website and or that the e-gambling website had failed to function properly and or that the e-gaming website application software provided by the plaintiff was incomplete, inefficient, inappropriate and inconsistent with that agreed between the plaintiff and the defendant and could not function properly because the application was full of bugs were not established at all.

[34] The defendant could not raise any evidence to discharge its evidential burden after the plaintiff's had testified that the plaintiff had performed its obligations to the defendant under the service agreement premised on, inter alia, the following:

(a) the evidence show that the BitCarra prototype was completed and the first version was successfully launched prior to the end of the initial period of the service agreement on or about 31 August 2021 and or 1 September 2021. In fact, the defendant had obtained the licence from the Curacao Authorities sometime in May 2022;

(b) the evidence that the initial period of the service agreement was extended and varied based on the requests of the defendant;

(c) the testimonies of PW1, PW2 and PW3 that the issues of delay were due to the additional features requested by the defendant and the delay to the licensing issues were due to the defendant's issues with Softswiff; and

(d) the evidence that the defendant was facing financial difficulties paying the plaintiff and had requested for various extensions with promises to pay the plaintiff's outstanding invoices without any complaints raised as regards the services rendered by the plaintiff.

[35] The defendant's testimony through DW1 that there were bugs in the BitCarra software by referring to various slack conversations between the parties was, with respect, insufficient to discharge the evidential burden that the plaintiff had fulfilled its obligation to develop a prototype which would enable the defendant to obtain an e-gaming licence for the operation of a gaming website from the Curacao Authorities.

[36] I accepted the testimonies of PW1, PW2 and PW3 that most if not all the bugs for the prototype were attended to and resolved by the plaintiff. In his evidence in chief, PW3 testified specifically to each of the bugs that were reported and resolved. I also accept PW1, PW2 and PW3's testimonies that bugs are an invariable part of any software development and that there could be occasional minor bugs that might surface in the course of the running of the BitCarra software. In fact, DW1 had not shown that the bugs were so serious that they adversely affected the defendant's application for the e-gaming licence from the Curacao Authority. On the contrary, the defendant accepted that the said licence had been issued by the Curacao Authority.

[37] Further, as regards the defendant's contention that the plaintiff had failed to deliver to the plaintiff an online gaming platform that was able to operate multiple cryptocurrencies for payment purposes, this court found that the defendant had not shown any agreement that the plaintiff was obliged to develop such a platform for the defendant and even then, that there was a contractual dateline for delivering such a platform.

[38] On the contrary, PW1's testimony that the original prototype did not contemplate multiple cryptocurrencies was not challenged. PW1 testified that whilst the plaintiff could modify the BitCarra prototype to accommodate

multiple cryptocurrencies, it would increase the workload and ultimately increased the timeline under the service agreement. In fact, notwithstanding that the plaintiff had advised the defendant against doing so, the defendant had proceeded with the same. In this regard, it must be noted that the plaintiff's witnesses had testified that the development of the BitCarra software was in fact led by the defendant with Joel Lim as the developer. The plaintiff was merely providing the manpower who would take instructions from Joel Lim. In PW3's unchallenged words:

> Joel Lim would instruct us and we would implement his instructions. Whilst the Plaintiff's developers gave feedback and advise to the Defendant on the development of BitCarra, it was ultimately Joel who decided on the way forward.

[39] More specifically, PW2 and PW3 led evidence that the defendant had insisted on building the crypto wallet in the prototype against their recommendation which had extended and complicated the initial works under the service agreement:

> CK UNG: Mr. Aslak, since you are the so-called expert in the development of the crypto wallet and the crypto transaction portion, do you on your own suggest a plan for the Plaintiff? Sorry, for the Defendant?
>
> PW2: I suggested a plan to develop this with using only Bitcoin in the beginning. And this is because whenever ... Any changes were required, for example, if the client wanted to change how things worked, they for instance, introduced an extra fee at some point, where a fee was charged on withdrawals from the website, now, had we only been using Bitcoin, this would be a one-time addition, but because we were now operating with four different currencies, and I would also like to point out My Lord that this is not just currencies as in US dollars, Malaysian ringgit, they all work the same way pretty much. The cryptocurrencies are different types of software, so they work in different ways. So, it's a substantial effort to implement each one. So, when this was multiplied by four, the workload also increased accordingly. This is why I advise that we start with one until all the requirements are in place, because then it is easier to add the others. If you do it in that order, you will save time because you've already locked down the requirements and you can then develop by just adding the others.

[40] In fact, from the contemporaneous communication between the defendant's Chief Executive Officer and PW1 during the period from March 2022 to July 2022, the defendant had repeatedly requested for more time to pay the plaintiff's invoices with not a single hint of complaints and or expression of dissatisfaction over the services rendered by the plaintiff. This led to PW1 finally instructing his team to stop all further works in July 2022 when no payments were forthcoming.

[41] For the reasons above, it was my judgment that the plaintiff had successfully discharged its legal burden on the balance of probabilities that the

defendant was indeed liable to pay the plaintiff the outstanding sum of USD248,000 for the plaintiff's invoices issued between January 2022 to July 2022.

SERVICE AGREEMENT NOT ILLEGAL AGAINST PUBLIC POLICY

[42] The defendant had also contended that the service agreement to develop an online casino gaming platform or software was a contract that was against public policy in Malaysia and by reason thereof could not be enforceable in Malaysia.

[43] More specifically, the defendant contended that plaintiff being a Malaysia based company had failed in its duty to design and provide the BitCarra software with a 'geo-fencing' ability. By this, the defendant meant that the software had no capability to exclude certain countries from accessing the website.

[44] It was contended that since gambling is illegal in Malaysia unless a license or permit has been granted by the authorities, such as the Unit Kawalan Perjudian under the Ministry of Finance, the plaintiff, as a Malaysian entity had knowingly engaged in an illegal activity in developing online gambling software or a platform when it failed to provide a geofencing function to allow BitCarra to block access from Malaysia.

[45] Reference was made to s 24 of the Contracts Act 1950 in support of the defendant's contention which stipulates that:

> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[46] With respect to counsel for the defendant, I also did not see any merits in the contention that the service agreement ought not to be enforceable by reason of the same being illegal on the ground that the agreement was either immoral or opposed to public policy in Malaysia.

[47] The contemporaneous documents and the evidence in this case quite

clearly showed that the service agreement was entered into because the defendant had wanted the plaintiff to provide manpower and or developers in order for the defendant to develop a prototype of a gaming website which would enable the defendant to obtain an e-gaming licence from the Curacao Authorities. Nowhere in the service agreement did it state that the website was for gambling or an online casino gaming platform that would be operated from Malaysia.

[48] In fact, in cl 7.4 of the service agreement, it was expressly stipulated that the defendant:

> represent warrants and agrees that its responsibilities with respect to the development are as follows:
>
> 7.4.1 it shall not operate the gaming website in any jurisdiction where such may be illegal and without a valid licence including in Malaysia, Hong Kong and Curacao;
>
> 7.4.2 it shall obtain the requisite and valid licence from each jurisdiction the website is to be operated prior to operation of the gaming website;
>
> 7.4.3 it shall notify Suria Labs immediately upon discovery of any potential breach or illegality in relation to the operation of the gaming website.

[49] The aforesaid put paid to any argument by the defendant that the service agreement had breached s 24 of the Contracts Act 1950.

CONCLUSION

[50] Accordingly, this court ordered the defendant to pay the plaintiff the sum of USD248,000 (or its equivalent in Ringgit Malaysia of RM1,113,520 as the exchange rate of RM4.49 to USD1 based on the rate by Bank Negara Malaysia on 14 March 2023) with interest thereon at the rate of 5%pa from 25 July 2022 until full payment. Further costs fixed at RM35,000 to be paid by the defendant to the plaintiff subject to allocator.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh